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No. 82-24

# In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

FRANCIS FORD, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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## REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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1. Amicus curiae National Automobile Dealers Association ("NADA") has suggested in its Brief in Opposition that this case is moot (Br. at 15-16). Francis Ford, Inc., however, has not made such a suggestion, nor in any way addressed this matter.

If Francis Ford, Inc., is insolvent, and there is no realistic possibility that either it or a successor corporation will resume the sale of automobiles, then this case would be moot. Since "the allegedly wrongful behavior could not reasonably be expected to recur," *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968), the Commission's order, if affirmed, could have no operative effect. Nor could the Commission obtain redress for consumers from whom surpluses have been unlawfully withheld in the past.

The Commission is reluctant to acquiesce in a suggestion of mootness absent confirmation by Francis Ford, Inc., which is in the best position to know its current business status. Our informal inquiry, however, suggests that, indeed, this case may be moot. We have been advised that although the corporation continues to exist and is not in bankruptcy or reorganization, its assets have been seized by creditors, and Ford Motor Co. has cancelled the Sales and Service Agreement pursuant to which respondent had been authorized to sell new Ford automobiles. While Francis Ford, Inc., could reacquire the right to sell new automobiles made by Ford or another manufacturer, or become a used car dealer, we have no information concerning these possibilities.

If this case has become moot, the judgment of the court of appeals should be vacated to deprive it of precedential effect.[1] *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93-94 (1979); *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950); *Duke Power Co.* v. *Greenwood*, 299 U.S. 259, 267 (1936). Each of the cases cited by NADA so holds. See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979); *Preiser* v. *Newkirk*, 422 U.S. 395, 403-404 (1975); *DeFunis* v. *Odegaard*, 416 U.S. 312, 320 (1974). The rationale set forth in *Munsingwear* for vacating the lower court decision when a case has become moot applies with particular force here. The administrative process should not be saddled with the uncertainty created by the Ninth Circuit's decision when there has been no opportunity for final review of that decision on its merits.

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[1] Rather than itself resolve this issue, the Court may wish to vacate the judgment and direct the court of appeals to determine on remand whether the case is moot.

Should the Court determine to proceed, we offer the following reply to the arguments on the merits presented by respondent and amicus curiae.

2. Francis Ford and NADA do not dispute that the Commission, like other administrative agencies, has authority to articulate in adjudicatory proceedings arguably novel statutory interpretations of widespread effect. Rather, they assert that the Commission's exercise of that authority was an abuse of discretion.

Notwithstanding the characterizations by Francis Ford and NADA, the court of appeals held that the Commission's use of adjudication instead of rulemaking exceeded its authority only because the Commission's decision articulated arguably new law of widespread application. This Court has ruled, however, that broad precedential effect, which is common to many adjudications, does not demonstrate action in excess of authority or an abuse of discretion. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-203 (1947); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974).

3. Assuming, contrary to what its opinion says, that the court of appeals relied upon other factors in requiring the Commission to proceed by rulemaking, it identified no statutory or decisional principle, and no distinction from numerous other precedent-making adjudications, to support a conclusion that the Commission abused its discretion.

NADA mischaracterizes the Commission's action as a "devious process" (NADA Br. at 9) calculated to create an adjudicatory precedent against Francis Ford which could then be used, as expressly authorized by Congress in Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B), to obtain civil penalties against other automobile dealers who might refuse to return surpluses to their customers. It erroneously asserts that the Commission

settled cases against Ford Motor Co. and Ford Motor Credit Corp. (and later, against six other parties, including two automobile dealers), but denied Francis Ford the opportunity to settle, instead insisting that the charges be tried so as to establish a litigated precedent. The court of appeals, however, did not even suggest, let alone premise its holding upon, this allegation.[2] Moreover, allegedly abusive rejection in an adjudication of a proffered consent order is not a basis for requiring rulemaking.

Similarly, NADA's unsupported allegation that the Commission's attempt to promulgate a rule while denying NADA's members the procedures of Section 18 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 57a, is of no avail to Francis Ford, which had the full rights of an adjudicatory respondent. NADA argues that in a rulemaking proceeding it could have participated as an interested person, while in the *Francis Ford* adjudication intervention by it was foreclosed. This observation not only conflicts with the record but is irrelevant to the choice between rulemaking and adjudication.[3]

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[2]The record in the court of appeals shows that Francis Ford submitted a proposed consent order (not accepted by complaint counsel) to the administrative law judge prior to trial. The law judge concluded that the proposed order was so "vague" that "[t]he Commission could never enforce this proposed order and complaint counsel quite justifiably oppose its certification [to the Commission]" (ALJ's Order of March 21, 1978, contained in Francis Ford's Excerpt of Record before the Ninth Circuit at 41-42). The Commission's Rules of Practice permit a matter to be withdrawn from adjudication only if both sides have signed a consent agreement (16 C.F.R. 3.25(c)) or if the respondent has offered a properly drawn consent agreement and the administrative law judge concludes there is a "likelihood of settlement" (16 C.F.R. 3.25(d)).

[3]NADA did not petition for review of the Commission's alleged denial of intervention, and Francis Ford was not prejudiced by it. Moreover, NADA was not excluded from this adjudication. NADA's own brief (at 7 n.6) concedes that it was granted limited rights of intervention, and invited by the Commission to reapply for expanded

As we have shown (Pet. 13-14), Congress has expressly provided in Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B), that the Commission, after having determined in an adjudication that particular conduct constitutes an "unfair or deceptive act or practice," may subsequently seek civil penalties against others not party to the original adjudication who violate its holding with actual knowledge thereof. Section 5(m)(1)(B) thus provides express legislative reaffirmation of the Commission's authority to render novel interpretations of Section 5 (15 U.S.C. (& Supp. IV) 45) in adjudications that will have widespread effect. Whatever challenges may be raised to a civil penalty suit charging a nonparty with knowing violation of the holding of an earlier adjudication, surely such

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rights should circumstances change (as they later did when Ford Motor Co. and Ford Motor Credit Corp. signed consent agreements, leaving Francis Ford alone in the adjudication). This admission (like Professor Davis' repudiation of the Ninth Circuit's reliance on his treatise (Pet. 16) provides further confirmation of the inaccurate treatment of the record in the Ninth Circuit's opinion, which, on the subject of NADA's intervention, recites simply that "[t]he National Association of Car Dealers [*sic*] sought to intervene to protect the interests of its members but was not allowed to do so" (Pet. App. 2a).

NADA lamely explains (Br. 8 n.6) that it felt inhibited from exercising the intervention rights granted, and the broader right offered because the Commission had indicated that NADA's participation should be limited to issues affecting the conduct of nonparty dealers. But NADA had asked only to intervene concerning the acts and practices of unidentified Ford dealers (NADA's Motion to Intervene, April 1, 1976), not concerning Francis Ford, which could obviously defend its own practices. Moreover, if NADA had genuinely felt its members' interests threatened by the adjudication against Francis Ford, the Commission's invitation to apply for the right to protect those interests obviously provided the opportunity to reapply, or at least to offer a brief amicus curiae before the Commission on the legal issues. Instead, NADA deliberately absented itself from the adjudication against Francis Ford before the Commission, then appeared before the court of appeals arguing that it had been denied an opportunity to participate before the Commission. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).

challenges may be raised only by the defendant in the later suit.[4] Francis Ford has had its day in court; it has received a full hearing on the merits, although the Commission's holding has yet to be reviewed on those merits by the court of appeals.

Finally, NADA is simply wrong in asserting that the pendency before the Commission of a proposed Creditors' Remedies Rule (40 Fed. Reg. 16347 (1975)) renders this adjudication an abuse of discretion. The Commission held in this adjudication that it was an unfair practice under Section 5 of the Federal Trade Commission Act for Francis Ford to withhold surpluses to which its customers were entitled under state law. The treatment of surpluses under state law is not addressed by the proposed Creditors' Remedies Rule, and NADA does not suggest that it is. The Commission elected to address this issue in adjudication, rather than by rulemaking, because it believed the duty to repay surpluses was sufficiently well-established to justify a potential action for consumer redress for its breach, under Section 19(a)(2) of the Federal Trade Commission Act, 15 U.S.C. 57b(a)(2) (Pet. App. 31a-32a). A rule cannot provide for pre-rule consumer redress (Pet. 2, 20). Only adjudication has enabled the Commission to achieve both redress and orders remedying unlawful withholdings of surpluses.

Theoretically, the Commission could have addressed the legal issue of withholding surpluses by rulemaking. But this would have been at the expense of the more than 10,000 consumers who have to date received refunds of more than

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[4]To date, two district courts have ruled in civil penalty actions under Section 5(m)(1)(B), that a party charged with violating an earlier holding of the Commission may contest the legal sufficiency of that holding de novo. United States v. *Braswell, Inc.*, [1981-82] Trade Cas. para. 64,325 (N.D. Ga.), aff'd, No. 81-9666 (11th Cir. Mar. 3, 1982); *United States* v. *Allied Publishers Service, Inc.*, No. CV-F-81-46 (E.D. Cal. Aug. 10, 1982).

$2.5 million in surpluses withheld from them by the eight parties who settled (Pet. 3-4). Discretion necessarily implies the authority to choose among two or more allowable alternatives. It can hardly be an abuse of discretion for the Commission both to correct an unfair practice under Section 5 and to provide a basis for consumer redress under Section 19, 15 U.S.C. 57b, thus satisfying two agency mandates rather than one.

4. Quite apart from mootness concerns, Francis Ford's alleged cessation of business in no way diminishes the general importance of this case. The Ninth Circuit's decision, if left to stand, will cast doubt upon the validity of adjudicatory proceedings of the Commission and all other agencies with adjudicatory and rulemaking responsibilities.[5] This shadow over a fundamental principle of administrative law—agencies' authority to choose between rulemaking and adjudication—should be dispelled. Francis Ford had a full adjudication concerning conduct that seems patently unfair—withholding from consumers surpluses earned on repossession. It is entitled to have the merits of that adjudication reviewed by the court of appeals, but it is not entitled to immunity from Section 5 until such conduct is condemned in a rulemaking proceeding.

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[5]Moreover, in this particular case, the eight consent agreements, signed by the Commission with other parties to the case, may be subject to demands for reopening under most favored corporation clauses should a final judgment be rendered holding that the Commission lacks authority to proceed against a company for unlawful withholding of statutory surpluses, the same practice covered by the orders.

## CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the writ of certiorari should be granted.

Respectfully submitted.

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